since the third defendant who had purchased this mortgaged property from the plaintiffs at the auction had now withdrawn from the purchase, the caveats should not be ordered to be removed as there was no mortgage sale in prospect, relying on a dicta of Chan Sek Keong J in *United Overseas Finance Ltd* v *Mutu Jeras*[6] at p 25. I am persuaded by the New South Wales Supreme Court decision, *Kerabee Park Pty Ltd* v *Daley*[7] which, inter alia, held that a caveator was not justified in maintaining his caveat, when requested by a mortgagee to withdraw it for the purpose of promoting a successful mortgagee's sale, if the caveator cannot establish that the mortgagee was, or might be, going to exercise his powers improperly; or that he might fail to apply any surplus proceeds in the manner required by law. Apart from the fact that there is no suggestion of impropriety on the part of the plaintiffs, the facts in *United Overseas Finance Ltd* v *Mutu Jeras*[6] are distinguishable from the facts in *Kerabee Park Pty Ltd* v *Daley*.[7]

In my view the filing of these caveats by the second, third and fourth defendants was frivolous and vexatious and all three caveats ought to be removed forthwith notwithstanding that the plaintiffs' application relate only to caveat CV/46137A which was defective in any case.

I also order that the second, third and fourth defendants pay the costs of the plaintiffs.

(2) OS No 1231 of 1989

That the second and third defendants are to totally withdraw caveat CV/33703A lodged by them in the Registry of Titles against the mortgaged property 99A by executing and lodging a duly stamped instrument of withdrawal of caveat within seven days from the date of this order.

I order that the second and third defendants pay the costs of the plaintiffs.

(3) OS No 1232 of 1989

That the second and third defendants are to totally withdraw caveat CV/55908A lodged by them in the Registry of Titles against the mortgaged property 101A by executing and lodging a duly stamped instrument of withdrawal of caveat within seven days from the date of this order.

I order that the second and third defendants pay the costs of the plaintiffs.

Application allowed.

Solicitors: *Ramdas & Wong; BT Tan & Co.*

Reported by *Teoh Ai Lin*

BEP Akitek (Pte) v Pontiac Hotel Pte Ltd

HIGH COURT (SINGAPORE) — SUIT NO 5326 OF 1983
KARTHIGESU J
29 NOVEMBER 1990

Civil Procedure — Pleadings — Counterclaim — Amendment — Amendment raising new claim — New claim statute-barred if commencing from date on which application was made — Date from which amendment becomes effective — Rules of the Supreme Court 1970, O 20 r 5(1), (2) & (5) — Limitation Act (Cap 163, 1985 Ed), s 31

Civil Procedure — Amendment — Amendment to counterclaim raising a new claim — New claim statute-barred if commencing from date on which application was made — Date from which amendment becomes effective — Rules of the Supreme Court 1970, O 20 r 5(1), (2) & (5) — Limitation Act (Cap 163, 1985 Ed), s 31

The plaintiffs were consultant architects for the defendants' project. They claimed under an agreement the balance of their professional fees in the sum of $415,893. Summary judgment was entered for part of this sum, liability for which was admitted by the defendants, but execution was stayed pending the trial of the defendants' counterclaim. The defendants delivered their defence and counterclaim. On 25 October 1989, the defendants applied to amend their defence and counterclaim, inter alia, by pleading a new claim by way of a counterclaim. The application was allowed by the assistant registrar who ordered that the amendments take effect from 25 October 1989. The defendants appeal against the part of the order that the amendments should take effect from 25 October 1989. The question before the court is whether the court has a discretion when a new claim which is statute-barred is pleaded by way of an amendment to a counterclaim to order that it takes effect from a date other than the date of commencement of the original action.

Held, allowing the appeal:
The court has no discretion to order that the date of the amendment takes effect from a date other than the date of commencement of the original action as s 31 of the Limitation Act (Cap 163, 1985 Ed) deems such a claim to have commenced on the same date as the action in which the set-off or counterclaim is pleaded. Section 31 overrides any discretion given to the court by para (1) of O 20 r 5.

Cases referred to
1 *Brickfield Properties Ltd* v *Newton* [1971] 3 All ER 328 (refd)
2 *Chatsworth Investments Ltd* v *Cussins (Contractors) Ltd* [1969] 1 All ER 143 (refd)
3 *Ketteman & Ors* v *Hansel Properties Ltd* [1987] 2 WLR 312; [1988] 1 All ER 38 (distd)
4 *Liff* v *Peasley & Anor* [1980] 1 WLR 781; [1980] 1 All ER 623 (refd)
5 *Liverpool Roman Catholic Archdiocesan Trustees Inc* v *Gibberd & Ors* (1987) 7 Con LR 113 (distd)
6 *Liptons Cash Registers & Business Equipment Ltd* v *Hugin (GB) Ltd & Ors* [1982] 1 All ER 595 (distd)

Legislation referred to
Limitation Act (Cap 163, 1985 Ed) s 31
Rules of the Supreme Court 1970 O 20 r 5

Limitation Act 1939 [UK] s 28
Limitation Act 1980 [UK] s 35(1), (2)
Rules of the Supreme Court [UK] O 20 r 5

Tang Khin Wai for the defendants/appellants.
Jimmy Yap for the plaintiffs/respondents.

Cur Adv Vult

Karthigesu J: This appeal raises an interesting and not unimportant procedural question. It is whether the granting of leave to amend a counterclaim, by raising a new claim which is statute-barred, should have been granted on terms that the amendment became effective only on the date on which the application to amend was made, thereby nullifying the defendants' new claim and giving the plaintiffs the defence of a statute-bar to that claim which the plaintiffs did not have when they commenced their action against the defendants.

The plaintiffs, describing themselves as consultant architects for the defendants' project now completed and known as the Pavilion Intercontinental (now The Regent Singapore), claimed under an agreement contained in or evidenced by the defendants' letter to the plaintiffs dated 17 May 1978 the balance of their professional fees in the sum of $415,893 by a specially indorsed writ of summons issued on 22 October 1983. On 19 March 1984, following an application for summary judgment the plaintiffs were given leave to enter judgment for $47,200, liability for which was admitted by the defendants, together with interest thereon at 8% per annum from February 1983 until 19 March 1984, but execution was stayed pending the trial of the defendants' counterclaim. The defendants were given unconditional leave to defend the remainder of the plaintiffs' claim in the sum of $368,693. The plaintiffs duly entered judgment on 2 April 1984.

On 4 April 1984, the defendants delivered their defence and counterclaim. The defence was that the agreement contained in or evidenced by the defendants' letter to the plaintiffs dated 17 May 1978 had been varied by an oral agreement on or about 11 July 1980 and consequently the fee payable was $1,960,000 and not $2,328,693. Since a sum of $1,912,800 had been paid, which the plaintiffs acknowledged having received, the sum due to the plaintiffs was the sum of $47,200 which the defendants admitted. The counterclaim alleged breaches of contract and negligence and claimed damages therefor. A reply and defence to counterclaim was delivered on 25 April 1984 joining issue with the defendants upon their defence and pleading various defences to the allegations of breaches of contract and negligence.

Notice of trial was duly given and the case set down for hearing on 2 December 1986.

The defendants by an application in chambers before the registrar dated 25 October 1989 applied to amend their defence and counterclaim, firstly, by withdrawing their admission that the $47,200 was due and payable to the plaintiffs and by pleading by way of a new defence that the plaintiffs were not 'registered architects' within the meaning of the Architects Act (Cap 12, 1985 Ed) and were thus prohibited by law from claiming or recovering fees or remuneration for architectural services rendered by the plaintiffs to the defendants. Secondly, by pleading a new claim by way of a counterclaim for the return of the sum of $1,912,800 as money had and received by the plaintiffs for the use of the defendants on the ground that the sum of $1,912,800, paid over a period from 6 May 1978 to 8 March 1983, was paid in pursuant of an ineffective and/or illegal agreement.

The learned assistant registrar who heard the application gave leave to the defendants to amend their defence and counterclaim in the manner stated above and ordered that the amendments take effect from 25 October 1989. The defendants' appeal is limited to that part of the learned assistant registrar's order that the amendments should take effect from 25 October 1989.

The relevant provision of the Rules of the Supreme Court 1970 applicable to this application is O 20 r 5 and more particularly paras (1), (2) and (5) which I set out below:

> (1) Subject to Order 15, Rules 6, 7 and 8 and the following provisions of this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph *if it thinks it just to do so*. (Emphasis added.)
>
> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

Order 20 r 5 is in pari materia with the English O 20 r 5.

Provided the condition specified in para (5) is satisfied, there clearly is a discretion for the court to permit a new claim to be made either by the plaintiff or the defendant by an amendment to the statement of claim or the counterclaim as the case may be. There can be no doubt of that and the plaintiffs, having persuaded the learned assistant registrar to exercise his discretion in

imposing the term of making the amendment to the counterclaim effective from 25 October 1989, regretfully for them, in my view, rest content in having preserved the defence of a statute-bar, or so they believe.

The question however is whether the court has a discretion when a new claim which is statute-barred is pleaded by way of an amendment to a counterclaim to order that it takes effect from a date other than the date of commencement of the original action. In my view there is not. Section 31 of the Limitation Act (Cap 163, 1985 Ed) provides as follows:

> For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

Again I must observe that this provision is in pari materia with s 28 of the English Limitation Act 1939. The annotation to this section in 19 *Halsbury's Statutes* (3rd Ed) at p 89 says this:

> The effect of this section is that, if this Act is pleaded to a defence of set-off or a counterclaim, the plaintiff, in order to establish his plea, must prove that the set-off or counterclaim was barred when he himself commenced his action and it is not enough to prove that it was barred at a time when it was pleaded.

In my view s 31 of the Limitation Act (Cap 163, 1985 Ed) overrides any discretion given to the court by the words 'on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct' appearing in para (1) of O 20 r 5.

I am fortified in this view by a consideration of the debate that has ensued in the English courts since the introduction of the English O 20 r 5 in its present form on 1 January 1964 to replace the then existing practice rule which was O 28 r 1 and which provided:

> The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purposes of determining the real questions in controversy between the parties.

As Edmund Davies LJ observed in *Brickfield Properties Ltd* v *Newton*[1] at p 340:

> No provision, one would have thought, would be more expansive or far-reaching. Yet for many years the courts acted in accordance with the decision in *Weldon* v *Neal* (1887) 19 QBD 394 that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by a Statute of Limitations.

Thus O 20 r 5 was a liberalizing provision and in the words of Lord Denning MR in *Chatsworth Investments Ltd* v *Cussins (Contractors) Ltd*[2] at p 145: 'the new RSC O 20 r 5(2), (3), (4) and (5) has specifically overruled a series of cases which worked injustice.'

The further debate that ensued in the English courts was whether an amendment duly made under O 20 r 5 took effect from the date when the amendment was made or from the date of the original document which it amended. This debate was laid to rest when the House of Lords in *Ketteman & Ors* v *Hansel Properties Ltd & Ors*[3] ruled in favour of the date when the amendment was made thus adopting the 'no useful purpose theory' as opposed to the 'relation back theory' so eloquently argued by Brandon LJ in his judgment in *Liff* v *Peasley & Anor.*[4]

It is not surprising that almost all the reported cases on this question are cases dealing with a plaintiff's application to amend the statement of claim raising a new claim which was statute-barred or the addition of a defendant against whom the claim would have been statute-barred. I am not aware of any reported case where the question of when the amendment took effect being discussed in relation to a counterclaim raising a new claim which was statute-barred. The reason seems obvious to me. It is because the Limitation Act (Cap 163, 1985 Ed) deems such a claim to have commenced on the same date as the action in which the set-off or counterclaim is pleaded.

In 1980, however, the English Parliament intervened and replaced the English 1939 Limitation Act with the 1980 Act. The current English position is succintly stated in the *Supreme Court Practice 1991* para 20/5-8/2 as follows:

> On the other hand in actions to which the Limitation Act 1980 applies, the relation back theory of amendment is expressly provided by statute. By s 35(1), it is provided that any new claim made in the course of the action will be deemed to be a separate action and except in the case of third party proceedings will be deemed to have been commenced on the same date as the original action and for this purpose s 35(2) provides that a 'new claim' means any claim by way of set-off or counterclaim and any claim involving either (a) the addition or substitution of a new cause of action or (b) the addition or substitution of a new party (see Vol 2 Limitation Act 1980, para 6160)

Thus, what applied in the case of new claims introduced by way of amendment to counterclaims under s 28 of the Limitation Act 1939 now applies to amendments to both statements of claim and counterclaims by reasons of s 35(1) and (2) of the 1980 Act.

The plaintiffs' counsel referred me to *Liverpool Roman Catholic Archdiocesan Trustees Inc* v *Gibberd & Ors*[5] referred to in para 20/5-8/2 of the *Supreme Court Practice* as unreported but which is in fact reported, in support of his submission that the court has a discretion to determine the date when an amendment shall take effect. A better case for him to have referred me to would have been *Liptons Cash Registers & Business Equipment Ltd* v *Hugin (GB) Ltd & Ors.*[6] In the former case, the judge acted on his own motion under O 20 r 8 to amend

the statement of claim and in the latter it was a plaintiff's application to amend the statement of claim. The Limitation Act 1980 did not apply to either of these two cases and it will be noted that in the former case the learned judge specifically acknowledged that the Limitation Act 1980 did not apply.

In my view, these cases are not authority for the proposition that the express provision in s 31 of the Limitation Act (Cap 163, 1985 Ed) deeming any claim, and this must include a new claim brought about by an amendment to the counterclaim, to have commenced on the same date as the action in which the counterclaim is pleaded can be displaced by the exercise of discretion provided in a practice rule.

An Act of Parliament overrides a practice rule. It cannot be otherwise. This is but a self-evident proposition for which no authority is needed. I therefore rule that the learned assistant registrar, in ordering the defendant's amendment to the counterclaim to take effect from 25 October 1989, exercised a discretion he did not have.

In the event, I allow the defendant's appeal and set aside that part of the learned assistant registrar's order dated 26 June 1990 ordering para 14 of the amended defence and counterclaim to take effect from 25 October 1989. The costs of this appeal will be taxed and paid to the defendants forthwith.

Appeal allowed.

Solicitors: *Lee & Lee; Donaldson & Burkinshaw.*

Reported by *Zarinah Marican*

MALAYSIAN REPORTS

Elayachee v Woo Siu Tip

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R8-11-28-90
EUSOFF CHIN J
3 JUNE 1991

Civil Procedure — Appeal to High Court — Memorandum of appeal — Time for filing — Whether appellant out of time — Subordinate Courts Rules 1980, O 49 rr 3(1), (2), (4) & 3A(3) — Rules of the High Court 1980, O 55 rr 2(1), 3 & 4(3)

In this appeal, the magistrate's court vide notice dated 20 November 1989 notified the appellant that a certified copy of the grounds of judgment was ready for collection upon payment of a sum of money. The copy of the grounds of judgment was sent to the appellant's solicitors on 11 December 1989 and received by them on 13 December 1989. On 6 February 1990 the magistrate's court served a copy of the notes of evidence on the appellant's solicitors who received them on 7 February 1990. The memorandum of appeal was filed in the High Court on 12 March 1990 bundled together with the record of appeal. The respondent's counsel raised a preliminary objection that the memorandum of appeal was filed 20 days out of time computed from 7 February 1990. No application for extension of time was made to extend the period of 14 days.

Held, dismissing the appeal:

(1) The requirement for the filing of a memorandum of appeal in the High Court and the service of a copy thereof on the respondent under O 55 r 2 of the Rules of the High Court 1980 ('RHC') is to notify the High Court and the respondent of the grounds of appeal which the appellant proposes to advance at the hearing of the appeal. It also enables the respondent to prepare his arguments to oppose those grounds, and if necessary to file a notice of cross-appeal for a variation of the lower court order, under O 55 r 3 of the RHC. The memorandum of appeal is a necessity and must be filed 14 days after the service on the appellant's solicitors, of the notes of evidence and the grounds of judgment by the subordinate courts.

(2) The amended O 55 r 2(1) of the RHC, vide PU(A) 462/90, requires that the memorandum of appeal whether or not an appellant is represented by a solicitor, must be filed within two weeks: (i) where the appellant is represented by a solicitor, from the date of the service on him of Form 141 notifying the appellant that the notes of evidence and grounds of judgment are ready; and (ii) where the appellant is not represented by a solicitor, from the date of the service on him of Form 141 notifying the appellant that the appeal record is ready. In either case, the memorandum of appeal is to be filed separately (in Form 113A) under O 55 r 2 of the RHC.

(3) In the present appeal the appellant is 20 days out of time when he filed his memorandum of appeal. He had not made an application supported by affidavit giving reasons why he had not, or could not, file the memorandum within the period of 14 days. Order 55 r 4(3) of the RHC states that where a memorandum of appeal is not filed within the prescribed time and no sufficient ground is shown for the delay, the appeal must be dismissed with costs. The court thus dismissed the appeal with costs.